

## EXPERIENCES AFTER *GRUTTER* & *GRATZ*

Melinda Grier  
University General Counsel  
University of Oregon

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The U.S. Supreme Court decisions in *Grutter v. Bollinger*<sup>1</sup> and *Gratz v. Bollinger*<sup>2</sup> on June 23, 2003, resulted in publicity, applause and, subsequently, much scholarly commentary. Many of us in higher education, especially those living in federal circuits where Regents of the *Regents of the University of California v. Bakke*<sup>3</sup> was well-established law, breathed a collective sigh of relief.

*Grutter* and *Gratz* confirmed that programs we relied upon to maintain racial and ethnic diversity at our college and universities could continue without constant concern or challenge. *Grutter* and *Gratz* set requirements for using race as a consideration in admissions decisions. Finally, *Grutter* and *Gratz* provided insight but not necessarily guidance about the use of race in other programs, such as financial aid, cultural and academic support programs.

### **Lessons Learned from *Grutter* and *Gratz***

By now you have probably heard and read the key lessons from the decisions. They are important to remember in evaluating existing programs and implementing new ones.

1. An applicant's race may be considered in making a decision regarding admission to a college or university or a specific program. But colleges and universities that consider race as a factor in admissions decisions may do so only on a very limited

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<sup>1</sup> 123 S.Ct. 2325 (2003).

<sup>2</sup> 123 S.Ct. 2411 (2003).

<sup>3</sup> 438 U.S. 265 (1974).

basis as part of an individualized assessment of an applicant's qualifications. Applicants may not be compared only to other applicants of their own race nor may applications from any one group be evaluated separately from those of other races. Additionally, an applicant's race may not be the "defining feature" or deciding factor in make an admission determination.<sup>4</sup> The decision does not address decision-making regarding financial aid or access to other benefits. Most commentators assume that some consideration of race is permissible in financial aid decisions as, to some extent, is participation in the award of race-targeted scholarships.<sup>5</sup>

2. *Grutter* and *Gratz* apply to admissions procedures at private colleges and universities as well as at public colleges and universities. Although the U.S. Supreme Court considered the programs in light of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution, it confirmed that the same analysis would apply under Title VI of the 1964 Civil Rights Act and 42 U.S.C §1981, both of which also apply to private colleges and universities.<sup>6</sup> For many years, the Office for Civil Rights interpreted Title VI as congruent with the Equal Protection Clause.

3. State law may further restrict the consideration of race in admissions or other decision-making. *Grutter* and *Gratz* establish the ceiling; they do not require consideration of race. State law, such as those adopted in California, Washington and Florida restrict the consideration of race in certain activities.<sup>7</sup>

4. Courts deciding if consideration of race violates the U.S. Constitution apply strict scrutiny which means they determine if the use of race serves a compelling interest and is narrowly tailored to achieve that interest.<sup>8</sup> The Court has adopted a "color-blind" approach to decision-making in which race is a consideration. It does not apply a different standard depending on the motive or purpose of the action. The courts subject any classification with a racial component to strict scrutiny regardless whether the purpose is to advantage or disadvantage a group based on race and regardless of

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<sup>4</sup> *Grutter*, 123 S. Ct. at 2343.

<sup>5</sup> See the wonderful piece submitted by my co-presenter Arthur Coleman and written by Arthur Coleman, Scott Palmer and Femi Richards, FEDERAL LAW AND FINANCIAL AID: A FOUNDATION AND FRAMEWORK FOR EVALUATING DIVERSITY RELATED PROGRAMS for discussion of consideration of race in award of financial aid.

<sup>6</sup> *Grutter*, 123 S.Ct. at 2347.

<sup>7</sup> Cal. Const. Art. I§31, Wash. Rev. Code Ann. Ch. 49 - 60, Fla Admin. Code Ann. R. 6C-6.002(7)

<sup>8</sup> *Grutter* 123 S.Ct. at 2329, citing *Adarand v. Peña*, 515 U.S. 200, 227(1995) (federal contracting), *Loving v. Virginia*, 388 U.S. 1, 11 (1967) (laws prohibiting interracial marriage).

whether the group to be advantaged historically was disadvantaged.<sup>9</sup>

5. Only two compelling interests – obtaining the educational benefits of a diverse student population and remedying the present effects of past discrimination – are adequate, in the Supreme Court’s eyes, to justify the use of race in education. Over the years, advocates of affirmative action have argued that past societal discrimination should provide adequate reason for consideration of affirmative action based on race. The Supreme Court has rejected that argument.

The Supreme Court, with other courts following its example, has also rejected other justifications, finding them to be inadequate legally. For example, courts have not permitted the use of race to correct lack of racial ethnic minorities in various professions or to provide teachers who can serve as role models for students.<sup>10</sup>

6. Consideration of race may be used only so long as it is necessary to create diversity. The Supreme Court expects colleges and universities to monitor admissions programs that include race as a factor and to determine when it is no longer necessary to give any consideration whatsoever to race without loss of the critical mass of students of color. Justice O’Connor expressed, in the majority opinion in *Grutter*, the Court’s expectation “that 25 years from now, the use of racial preferences will no longer be necessary.”<sup>11</sup> Many of us, who have watched this country’s slow progress in building true racial diversity, share the Court’s hope but are less optimistic that we will have reached a place where we can achieve acceptable levels of diversity without affirmative consideration of race. The Court’s opinion should be taken as a warning of the need to begin developing the data and the informational support we will need to continue our efforts as we move toward the 25 year target Justice O’Connor set for us. Unless the Court’s predictions are correct, we cannot hope that courts will ignore the Court’s dicta as 2028 approaches.

7. Colleges and universities that consider present effects of past discrimination in any manner need to establish a strong body of specific evidence to

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<sup>9</sup> Nothing in the Constitutional language requires the Court to use this analysis. See below at 13 for a discussion of developing a different jurisprudence in considering programs that increase diversity.

<sup>10</sup> *Bakke*, 438 U.S. at 310-311, *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), *Taxman v. Board of Education of Township of Piscataway*, (trying to support the need for affirmative action in retaining school teachers serve as role models, *Hazelwood School District v. United States*, 433 U.S. 299 (1977)(establishing that the proper evaluation of the teaching workforce is available qualified teachers, not representation of the local population or the student population).

<sup>11</sup> *Grutter*, 123 S.Ct. at 2347.

demonstrate past discrimination and to determine which groups are under-represented as a result of past discrimination. Evidence could include examples of previous efforts that did not rely on race and that failed to be effective.<sup>12</sup> Use of this justification will, at least, require developing data regarding under-representation comparable to that developed by employers preparing affirmative action plans to fulfill their obligations as federal contractors.<sup>13</sup>

8. Colleges and universities that base diversity goals on the compelling interest of providing an educational benefit of a diverse student body to all students have considerable flexibility to establish numerical estimates of the number of students necessary to achieve their goal. In determining whether their student bodies are adequately diverse to provide educational benefits to all students, colleges and universities are not bound to reflect the population, either the general population or the available student population. Instead, the Supreme Court approved the concept that a critical mass of students are required to maintain diversity and to ensure that all students have an adequate opportunity to be exposed to individuals of other racial/ethnic groups.

### **Taking Action Now -- For the Future**

As we consider where to focus our energy and resources, we need two strategies: one, to implement programs now using guidance the Court provided in *Grutter* and *Gratz* to diversify our campuses and make educational opportunity a reality for students of all races, and another, to establish the base we will need to continue to achieve that goal, regardless of where we find ourselves in 2028.

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<sup>12</sup> *Washington v. Davis*, 426 U.S. 229, 250-52 (1976), *Geier v. Alexander*, 801 F.2d 799 (6<sup>th</sup> Cir. 1986). *United States v. Fordice*, 505 U.S. 717 (1992)

<sup>13</sup> See, e.g., U.S. Department of Education, *1994 Policy Guidance*, 59 Fed. Reg. 8756 (1994) (requirement that colleges and universities using race targeted financial aid to overcome the present effects of past discrimination provide a detailed statistical basis to support evidence of past discrimination).

## ***Rules and Tools for the Journey***

As we begin our work, I offer the following observations.

### **1. Be cautious when comparing employment and contracting cases with education cases.**

The Court cites contracting cases extensively in its opinion and the Constitutional underpinnings of the Court's decisions are the same in education, employment and contracting. In all its decisions related to race, whether in employment, contracting, providing benefits or education, racial classifications are subject to strict scrutiny, meaning that programs using racial classifications must be narrowly tailored to meet a compelling state interest. In considering if a program is narrowly tailored, the courts look to see if race-neutral alternatives will achieve the same benefit and consider if the program imposes an undue burden on<sup>14</sup> or unnecessarily trammel the interests of<sup>15</sup> not members of the racial or ethnic groups who receive the benefits.

However, the Court is much more deferential and much less suspicious of decisions made by educators regarding the provision of educational benefits than decisions made by employers, even educators are acting as employers.<sup>16</sup> As Justice O'Connor states "Context matters when reviewing race-based governmental action under the Equal Protection Clause."<sup>17</sup> As Justice O'Connor also notes that while the Court's scrutiny is no less strict when it is assessing "complex educational judgments,"<sup>18</sup> the Court also has a "tradition of giving a degree of deference to a university's academic decisions."<sup>19</sup> Or as Justice Powell announced, "The freedom of a university to make its own judgments as to education includes the selection of its own students."<sup>20</sup>

The Court's greatest expression of this deference is in the endorsement of educational benefits of a diverse student body. The Court has found nothing in the contracting or employment context to be as compelling as the recognition that a lack of

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<sup>14</sup> *Grutter*, 123 at 2345.

<sup>15</sup> *Steelworkers v. Weber*, 443 U.S. 193, 208 (1979) (decided under Title VII of the 1964 Civil Rights Act but incorporating the same type of analysis used by the Court in considering Constitutional challenges to racial classifications).

<sup>16</sup> Compare *Wygant*, *Bakke* and *Grutter*.

<sup>17</sup> *Grutter*, 123 at 2338.

<sup>18</sup> *Id.*, 123 at 23XX.

<sup>19</sup> *Id.*

<sup>20</sup> *Bakke*, 438 U.S. at 312. See also, e.g. *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214 (1985), *Board of Curators of Univ. of Missouri v. Horowitz*, 435, U.S. 78 (1976).

racial diversity harms all students' education regardless of their race. Employers, suggesting the importance of providing role models, or government agencies, wishing to support economic development for previously disadvantaged groups, have been dismissed as trying to cure societal problems without limiting their efforts to the identifiable victims of past discrimination.

The Court's deference is coupled with a tolerance only for affirmative action programs that do not have the effect of choosing one individual over another on the basis of race, or as the Court states, that are narrowly tailored because they do not "unduly harm members," especially identifiable members, of any racial group.<sup>21</sup> The Court understands the complexity of admissions decisions, accepting that a decision to admit or reject does not rely on a single factor but is a complicated assessment of a college or university's specific needs and educational policies. The decision to admit one student rarely results in a decision not to admit another identifiable student.

In contrast, the Court sees the selection of one contractor or applicant as meaning that another contractor or applicant is not selected.<sup>22</sup> Two cases in which the Court upheld employers' affirmative efforts, while distinguishable on other grounds,<sup>23</sup> make clear the importance the Court places on minimizing any negative effect of affirmative action on identifiable individuals. In one, the employer established a training program in which African Americans were guaranteed 50% of the openings. In approving the program, the Court noted participation in the program did not affect the employer's hiring, advancement or discharge of specific employees.<sup>24</sup> In the other case, the Court reasoned that the employer's consideration of race in the selection of one well-qualified candidate for promotion did not affect the unsuccessful candidate's previous job, salary and seniority.<sup>25</sup>

*Grutter* should not be seen as an indicator that this Court will be more tolerant of affirmative action in employment or contracting than in the past. On the other hand, of more importance, future cases that take a restrictive view of affirmative action in

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<sup>21</sup> *Grutter*, 123 at 23XX.

<sup>22</sup> See, e.g. *Wygant*, *Adarand Constructors, Inc. v Peña*, 515 U.S. 200 (1995); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

<sup>23</sup> *Weber*, *supra*, and *Johnson v. Transportation Agency, Santa Clara County, California*, 480 U.S. 616, are both cases decided under Title VII. Plaintiff in *Johnson* did not raise Constitutional issues although they were present because the defendant was a public body. Additionally, even if Plaintiff had raised Constitutional claims in *Johnson*, Constitutional claims of sex discrimination are considered under intermediate rather than strict scrutiny, a lower standard of review.

<sup>24</sup> *Weber*, 443 at 208.

<sup>25</sup> *Johnson*, 480 at 638.

employment or contracting should not be seen as limiting *Grutter*. Prior to *Grutter* and *Gratz* some commentators and courts suggested the *Bakke* decision should be curtailed in light of later Supreme Court cases involving employment and contracting.<sup>26</sup>

**2. It is almost impossible to establish a compelling interest based on the present effects of past discrimination.**

The Court in *Grutter* confirms its earlier opinions that remedying past discrimination is a compelling state interest justifying government use of race. Despite that, the Court has rarely approved programs based on past discrimination. In both employment and education, the courts have upheld or even ordered consideration of race as remediation for de jure segregation.<sup>27</sup> However, absent court findings, programs developed to overcome past discrimination even where a university entered into a consent decree with the U.S. Office for Civil Rights to resolve federal enforcement action.<sup>28</sup>

Similarly, the U.S. Department of Education, Office for Civil Rights 1994 Policy Guidance, Nondiscrimination in Federally Assisted Programs; Title VI of the Civil Rights Law of 1964<sup>29</sup> identifies five principles that permit consideration of race in awarding of financial aid. Two of the principles, Principle 3 Financial Aid to Remedy Past Discrimination and Principle 4 Financial Aid to Create Diversity, mirror the two interests the Supreme Court considers compelling enough to permit consideration of race in admissions.<sup>30</sup> Principle 3 expressly states that no finding of discrimination is required as long as the college or university has a strong basis in evidence of its past discrimination and the program is narrowly tailored. The 1994 Policy Guidance allows either documented incidents of intentional discrimination or evidence of a statistically significant disparity between the student population and the relevant qualified applicant pool.

My experience also suggests colleges and universities should be wary of relying

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<sup>26</sup> See, e.g., *Podberesky v. Kirwan*, 38 F.3d 147 (4<sup>th</sup> Cir.), amended, 46 F.3d 5 (4<sup>th</sup> Cir. 1994), cert. denied, 514 U.S. 1128 (1995); *Hopwood v. Texas*, 78 F.3d 932 (CA5 1996); *Johnson v. Board of Regents of University of Georgia*, 263 F.3d 1234 (11<sup>th</sup> Cir. 2001).

<sup>27</sup> See, e.g., *United States v. Fordice*, 505 U.S. 717 (1992); *Geier v. Alexander*, 802 F.2d 799 (6<sup>th</sup> Cir. 1986); *Adams v. Richardson*, 356 F.Supp. 92 (D.D.C. 1973), modified, 480 F.2d 1159 (D.C. Cir. 1973) (en banc). In the employment context, *United States v. Paradise*, 480 U.S. 149 (1987) upheld hiring quotas imposed by the district court after the Alabama Department of Public Safety failed to comply with an earlier remedial decree.

<sup>28</sup> See, e.g., *Hopwood*.

<sup>29</sup> 59 Fed. Reg. 8756 (1994).

<sup>30</sup> The other principles – Financial Aid to Disadvantaged Students [even with a disparate impact by race] and Financial Aid Authorized by Congress and Private Aid Restricted by Race or National Origin – do not directly involve racially targeted affirmative action by colleges and universities.

on Principle 3 in award of financial aid. In the 1980's, the Oregon State Board of Higher Education adopted an Under-represented Minority Achievement Scholarship (UMAS) Program to attract and retain highly qualified students from racial-ethnic groups who were not attending Oregon's 4-year public colleges and universities at a rate that would be expected given the population in the state. Prior to adopting the UMAS Program, the Board was presented with statistics demonstrating a statistically significant disparity between the student population and the population that would be projected based on the number of high school students graduating from Oregon high schools for three racial groups: African Americans, Native Americans and Latino/Hispanic Americans. With this information and with knowledge of Oregon's treatment of African Americans, Native Americans and Latino/Hispanic Americans, especially in the late 19<sup>th</sup> and early 20<sup>th</sup> Century, the Board offered a program of tuition waivers to students who were highly qualified for admission. This program was in addition to another program in which any highly qualified Oregon high school graduate might qualify for financial assistance.

In 1993, the Office for Civil Rights received a complaint alleging the UMAS program violated Title VI. Through lengthy negotiation it became apparent that, despite Principle 3, the Office for Civil Rights did not consider statistical and anecdotal evidence alone, absent a judicial finding of discrimination, adequate to support award of financial aid under Principle 3. (The Office for Civil Rights does consider the current program which considers race as one diversity factor in the award of tuition waivers and which is designed to build a critical mass of students at each campus, rather than to correct under-representation, as meeting the requirements of Principle #4, Financial Aid to Build Diversity.)

**3. Consideration of race is not a racial quota or selecting less qualified students, it is ensuring our students receive a good education.**

As we all know deciding who is qualified for admissions is not a science; at best it is an art, and most often it is a prediction, an educated prediction informed by extensive experience, but no less certain than other predictions. It is based on an assessment performed by trained professionals whose opinions are informed by their own observations and often by data that correlate qualifications to subsequent success. We rely on test, grades, written statements and other information, all of which are good predictors. We know that they allow us to make estimates of which students are more or

less qualified.

Some colleges and universities have relied primarily on high school grades and test scores. Of course, while these may appear to be race-neutral indicators, studies suggest that is not the case. Howard T. Everson and Roger E. Milsap, in “Beyond Individual Differences: Exploring School Effects on SAT Scores,”<sup>31</sup> conclude that a high school student’s SAT scores correlate strongly with the structure and organization of the high school the student attends. Even when comparing only public high schools, Everson and Milsap found that school size, proportion of students in poverty and racial/ethnic composition were “important and meaningful predictors” of a student’s SAT scores. As they point out, African American and Hispanic students score lower than white and Asian American students in reading, mathematics and science.<sup>32</sup> Quoting M. Dabady, “African Americans, Hispanics, and American Indians – compared with whites, Asians, and Pacific Islanders – are more likely to attend lower-quality schools with fewer material and teacher resources, and are more likely to have lower test scores, drop out of high school, not graduate from college, and attend lower-ranked programs in higher education.”<sup>33</sup> Everson and Milsap dismiss the notion that the SAT itself is discriminatory. For our purposes, it does not matter if African American, Hispanic and Native American students score lower because of the test itself or, as Everson and Millsap’s data supports because they are more likely to attend high schools with fewer resources and extracurricular activities, higher levels of poverty and other issues related to size and structure. What is clear is that use of the SAT and likely other “standardized” measures of achievement do not provide race-neutral information about applicants.

Ensuring diversity of the student population is ensuring students have the best educational experience possible. Gary Orfield and Dean Whitley, in their study “Diversity and Legal Education: Student Experiences in Leading Law Schools,”<sup>34</sup> report overwhelmingly positive responses to questions regarding the educational benefit of racial diversity in results of a survey administered to law students at University of

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<sup>31</sup>Everson, Howard T. and Roger E. Millsap, *College Board Research Report No. 2004-3*, New York: College Entrance Examination Board, 2004. Found at <http://www.collegeboard.com>.

<sup>32</sup> *Id.*, citing *College Bound Seniors*. College Board, New York: College Entrance Examination Board (2003).

<sup>33</sup> Dabady, M. “Measuring racial disparities and discrimination in elementary and secondary education: An introduction.” *Teachers College Record* 105(6), 1048 (2003) cited in Everson and Millsap, 1.

<sup>34</sup> Orfield, Gary and Whitley, Dean, published in *DIVERSITY CHALLENGED*, ed. Gary Orfield and Michael Kurlaender, Harvard Educational Publishing Group, 2001, p. 143.

Michigan and Harvard Law Schools. These students reported that racially diverse classes provided greater intellectual challenge, more serious discussion of alternative perspectives and discussed greater variety of subjects and examples.<sup>35</sup>

#### **4. Judicial views on the prevalence of race discrimination help us understand court opinions regarding affirmative action.**

Although opinions about race discrimination are personal and individual, understanding the justices' view of the prevalence of race discrimination provides valuable information of what shapes justices or other judges opinions. Most judges share the view that discrimination against historically disadvantaged racial groups is unacceptable. Judges differ greatly in their perspective of the prevalence of race discrimination individuals identified in those groups experience today. Those who believe that race discrimination, while perhaps prevalent in the past, has largely disappeared today see a world in which the remedies vary greatly from those who believe that race discrimination continues to be prevalent. In summary, where you stand depends on where you sit.

This may be illustrated by Justice O'Connor's easy acceptance of the concept of critical mass and its importance in maintaining a diverse student body. "Critical mass" was discussed in a number of the *Grutter* and *Gratz* briefs, including the amicus brief filed by the American Educational Research Association, the Association of American Colleges and Universities, and the American Association for Higher Education. It quotes from *Diversity Challenged*, defining "critical mass," as "Enough students to overcome the silencing effect of being isolated in the classroom by ethnicity/race/gender. Enough students to provide safety for expressing views."<sup>36</sup> That brief cites a national survey conducted of law school faculty in which more than 50% of faculty believe strongly that "having a critical mass of a particular racial/ethnic groups is important" to the group's participation in the classroom.<sup>37</sup>

Justice O'Connor is considered a pivotal swing vote in decisions regarding discrimination and affirmative action. We should not be surprised that Justice O'Connor

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<sup>35</sup> *Id.* at 167.

<sup>36</sup> P. 23, citing Gudeman, Roxanne Harvey, Faculty Experience with Diversity: A Case Study of Macalester College, in *DIVERSITY CHALLENGED*, supra, 251, 267-68.

<sup>37</sup> White, Richard A., "Preliminary Report: Law School Faculty Views on Diversity in the Classroom and the Law School Community" (May 2000), available at <http://www.aals.org/statistics/diverse3/pdf> at 3-4.

understands the importance of having a critical mass of students of a particular group. When she graduated from law school in 1952, she was the 56<sup>th</sup> woman graduate since the first woman received her LL.B. from Stanford Law School in 1917.<sup>38</sup> It is likely she knows from personal experience how lack of a critical mass of women affects one's law school experience. Her comfortable acceptance of the concept should remind us, that as the Court ages<sup>39</sup> and Justices leave the Court, it will be crucial that those who replace them understand the key diversity concepts.

**5. The U.S. Constitution does not require the "color-blind" approach to affirmative action used by the current Court.**

Justice Stevens pointed out in his dissent to *Adarand Contractors, Inc. v. Peña*<sup>40</sup>, the Court's "color-blind" approach to affirmative action assumes there is

"no significant difference between a decision by the majority to impose a special burden on the members of a minority race and a decision by the majority to provide a benefit to certain members of that minority notwithstanding its incidental burden on some members of the majority.... There is no moral or constitutional equivalence between a policy that is designed to perpetuate a caste system and one that seeks to eradicate racial subordination.... Invidious discrimination is an engine of oppression.... Remedial race-based preferences reflect the opposite impulse. No sensible conception of the Government's constitutional obligation to 'govern impartially,' ... should ignore this distinction."<sup>41</sup>

In her dissent in *Adarand*, Justice Ginsburg also points out the continuing effects of United States' history of pervasive race discrimination. She notes the Court previously had recognized Congress' authority "not only to end discrimination, but also to counteract discrimination's lingering effects."<sup>42</sup>

We should consider *Gratz* and *Grutter* as a foundation we can use to gain acceptance of this distinction even in the narrow context of providing the educational benefits of a diverse student population. As Justice Stevens' and Justice Souter's dissents in *Adarand* point out, the Supreme Court previously approved federal programs

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<sup>38</sup> "Celebrating a Century of Women at Stanford Law School," <http://www.law.stanford.edu/events/wal> . This site notes that Stanford' has been open to women in the law since the undergraduate Law program opened in 1893 and continued that tradition when the Law School was organized in 1908.

<sup>39</sup> Four of the Justices are over 70 and four in their 60's. Only Justice Thomas is younger than 60.

<sup>40</sup> 515 U.S. 200 (1995).

<sup>41</sup> *Id.* at 243.

<sup>42</sup> *Id.* at 272.

that were designed to overcome the present effects of past discrimination.<sup>43</sup> The conversation regarding the boundaries of affirmative action is not finished.

For example, Justice Rehnquist asserts in his dissent that strict scrutiny requires a “reasonably precise time limit” on the use of race. He rejected the University of Michigan’s statement it would “cease considering race when genuine race-neutral alternatives become available.”<sup>44</sup> To the contrary, it is hard to imagine how a University could establish a precise time limit when it could achieve a racially diverse student population without some consideration of race. *Bakke* was decided in 1974. Thirty years later we have made progress but not enough to overcome years of invidious racial classification and discrimination.

As a nation, we have not reached consensus on the basis and contours of affirmative action. We must work to develop a broader understanding and acceptance of the necessity of affirmative action. Lester C. Thurow provided a useful analogy to describe the difficulties we face in approaching affirmative action.

“Imagine a race with two groups of runners of equal ability. Individuals differ in their running ability, but the average speed of the two groups is identical. Imagine that a handicapper gives each individual in one of the groups a heavy weight to carry. Some of those with weights would still run faster than some of those without weights, but on average, the handicapped group would fall farther and farther behind the group without the handicap.

Now suppose that someone waves a magic wand and all of the weights vanish. Equal opportunity has been created. If the two groups are equal in their running ability, the gap between those who never carried weights and those who used to carry weights will cease to expand, but those who suffered the earlier discrimination will never catch up. If the economic baton can be handed on from generation to generation, the current effects of past discrimination can linger forever.”<sup>45</sup>

As Thurow points out, although the rules have become fair, not every runner has an equal chance to win. Thurow explores the alternatives to overcome the disadvantage runners with weights face: stop the race and start again, force those who didn’t have weights to carry weights for an equal time or provide extra assistance to those who had

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<sup>43</sup> *Id.* at 250, citing *Metro Broadcasting, Inc. V. FCC*, 497 U.S. 547 (1990) and *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

<sup>44</sup> *Grutter, supra*, at 2369-70.

<sup>45</sup> Thurow, Lester C., *THE ZERO SUM SOCIETY*, Basic Books, New York, N.Y. 1980, pp. 188-189.

weights.

The Supreme Court's opinions have assumed that none of the alternatives proposed by Thurow is acceptable. Its decisions in *Grutter* and *Gratz* do not change that. The Supreme Court continues to allow consideration of race because of its educational benefit to all students not to equalize the effect the "weight" of invidious race discrimination has imposed on certain racial/ethnic groups. However, perhaps the Supreme Court's confirmation that race can be considered when it is for the benefit of all students can provide a means to re-ignite discussions of ways to address our history of race discrimination and to overcome the present effects of past discrimination. We should not lose sight of the distinction between consideration of race when it is invidious discrimination and when it is a remedy for the effects of invidious discrimination. As John Hart Ely commented many years ago, "Whether it is more blessed to give than to receive, it is surely less suspicious."<sup>46</sup>

#### **6. Younger generations expect a racially diverse educational experience.**

Whether law school, undergraduate education, or the workplace, younger students and employees value racial diversity. They are part of a more diverse generation; they experience diversity as both a positive and a necessary circumstance. Ninety percent of those termed the Millennial Generation (born during the last two decades of the twentieth century) have friends of a different race; over eighty percent are completely comfortable with dating interracial.<sup>47</sup> Although students may have little exposure to people of a different race while in high school, once they enter college their experience is different. Over half the students at Harvard and University of Michigan law schools reported having roommates of a different race or ethnicity as undergraduates even though most had very little contact with those of a different race in high school.<sup>48</sup> Many of these students reported having close friends of different races.<sup>49</sup>

Not surprisingly, Orfield and Whitla also found these students value the contribution racial ethnic diversity makes to their education. Over two-thirds believed that racial diversity enhances or moderately enhances how they or others think about

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<sup>46</sup>Ely, John Hart, "The Constitutionality of Reverse Racial Discrimination," 41 U.Chi. L. Rev. 723, (1974).

<sup>47</sup> Howe, Neil and Strauss, William, *MILLENNIALS RISING: THE NEXT GREAT GENERATION*. New York: Vintage Books, 2000, p. 218, citing Time (July 5, 1999) and "Youth Source" on <http://www.react.com> (1999).

<sup>48</sup> Orfield, *supra*, at 156.

<sup>49</sup> *Id.*

problems in classes and their ability to get along more effectively with members of other races.<sup>50</sup> A similarly high percentage believe that racial diversity clearly enhances or moderately enhances the way topics are discussed in both informal and classroom settings.<sup>51</sup> They believe that conflicts because of racial differences challenge them to rethink their own values and, for many, enhances, at least to some degree their learning experiences.<sup>52</sup> Perhaps the greatest indication of the importance of diversity to their learning experience is that 80% of the students polled at both schools believe the admissions policy that seeks to increase the number of under-represented minority should either be maintained or strengthened.<sup>53</sup>

All indications are that the next generation is impatient with lack of diversity in the student population, the faculty, the administration, and in the cultural representations they see around them. As one commentator noted, they are way beyond accepting diversity, they expect it.<sup>54</sup>

### ***The Journey***

*Grutter* and *Gratz* require us to be actively involved if we want to consider race to in admissions and other programs as part of our effort to diversify our student programs. There is work to be done. Some of the suggestions are time-consuming; some require us to undertake research; all of them require us to be thoughtful and deliberate in the development of our programs.

- *Involve faculty and students* – Colleges and universities that want to consider race must document the importance of a diverse student population, evaluate race-neutral alternatives and their likely success, and develop institution-specific data regarding critical mass.
- *Conduct periodic reviews* – Colleges and universities must assess their progress in meeting their student diversity goals, much like they do in employment. As the Court pointed out, programs are permissible only so long as they are necessary.

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<sup>50</sup> *Id.* at 158 - 159.

<sup>51</sup> *Id.* at 160.

<sup>52</sup> *Id.* at 162 - 163.

<sup>53</sup> *Id.* at 168.

<sup>54</sup> Lancaster, Lynne C. and Stillman, David, *WHEN GENERATIONS COLLIDE*, HarperCollins, New York, N.Y., 2002, p 322.

Programs where race is a consideration should be evaluated on a regular basis to substantiate that they contribute to achieving diversity.

- *Review all current and any new programs for consistency with Grutter and Gratz* – If race is a factor in determining participation or admission, focus on review of all qualifications. Avoid rating systems that award points.
- *Put a plan in place* – Develop a plan that will incorporate updating and periodic review and assessment.

The Supreme Court's decisions in *Grutter* and *Gratz* provide us with a chance to achieve diversity, but not without a price. Colleges and universities cannot afford to sit and wait and hope for the next 25 years. The opportunity is ours now.